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THE NINTH CIRCUIT'S INVASION OF THE TORT OF INVASION OF PRIVACY

Harvey L. Zuckman*

I. INTRODUCTION**

The tort of invasion of privacy has had a short but tortuous development made even more tortuous by a number of recent rulings by the United States Court of Appeals for the Ninth Circuit. This common law tort does not begin with the normal judicial iterations that created and sculpted other torts.¹ Rather, it began life as a law review article prompted by personal pique.²

One of the co-authors of the law review article was Samuel D. Warren, a socially prominent Boston lawyer who felt that he was being unfairly hounded by the news media. The final straw for Warren was the press' encampment around his home during a party for his daughter. When he returned to his law office still fuming over the incident, he is alleged to have said to his law partner Louis D. Brandeis, who would later become a justice of the United States Supreme Court, that there must be some basis in the law to protect himself and his family from such intrusiveness by the press.³ Out of Warren's pique and Brandeis' sympathy for his partner's plight came the famous article that gave birth to the tort of invasion of privacy.

In the article published in the *Harvard Law Review*, the two men argued that historically, the common law protected personal privacy. But their central authority for this proposition is doubtful at best. The case they relied on was *Prince Albert v. Strange*.⁴ There, Queen Victoria's consort brought an action to enjoin not only the reproduction of etchings made by the royal couple for their own pleasure but also the publication of a summary description of the works. The court went beyond established common law protection of intellectual property because a mere summary description or simple listing of the etchings would hardly have qualified as an invasion of any property interest.⁵ Vice-Chancellor Knight Bruce said that the courts in proper cases would prevent injurious disclosures as to private matters.⁶

It does not appear to have occurred to Warren and Brandeis that *Prince Albert v. Strange* may just have been a *sui generis* hometown decision favoring the nominal ruler of the court handing down the decision. Up until recently, the English courts have not recognized an independent right of privacy as to all the mere subjects of the realm.⁷

Given its dubious birthright, it was little wonder that the first court to consider the claim of com-

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¹ E.g., assault (I. de S. Wife v. W. de S. [1348 or 1349] Y.B., Liber Assisarum, folio 99, placitum 60); intentional infliction of emotional distress ("shock") (Wilkinson v. Downton, [1897] 2 Q.B. 57); modern negligent infliction of harm (Brown v. Kendall, 60 Mass. 292 (1850)).

² Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

³ *Id.*

⁴ 2 De Gex & Sm 652, 64 Eng. Rep. 293 (V.C. 1848), *on appeal* 1 McN. & G. 25, 64 Eng. Rep. 293 (1849).

⁵ *Id.*

⁶ *Id.*

⁷ See *Anderson v. Fisher Broad. Co.*, 712 P.2d 803, 808-09 (1986); REPORT OF THE COMMITTEE ON PRIVACY, CMND. 5, No. 5012 (1972); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 342 n.268 (1983). Only in 2001, was a nascent right of privacy apparently recognized. See *Douglas v. Hello! Ltd.*, [2001] W.L.R. 992, 1033, para. 110 ("[W]e have reached a point at which it can be said with confidence that the law recognizes and will appropriately protect a right of personal privacy.") (per Sedley, L.J.); Stephen Boyd, *Does English Law Recognize the Concept of an "Image" or Personality Right?*, 13 ENT. L. REV. 1, 7-8 (Jan. 2002) ("English courts have not moved with the times.").

mon law protection for privacy rejected it.⁸ However, over the next seventy years, most American courts accepted the idea of such protection of privacy in a number of disparate situations, but without much rhyme or reason.⁹

To bring order out of the chaos that Warren and Brandeis had wrought, the late Dean Prosser wrote a seminal law review article identifying four distinct branches of the tort.¹⁰ According to Prosser, they are: intrusion into another's seclusion; unreasonable publicity of private embarrassing facts; casting another in a false light; and appropriation of another's name, image or personality for personal benefit.¹¹

But even Prosser did not fully regularize these torts that have become known collectively as invasion of privacy, and he even added to the tortuousness of their development. First, he tried to justify the existence of the "rather nebulous" tort of "false light"¹² by arguing that the interest protected was that of reputation, having the same overtones of mental distress as in defamation.¹³ With all due deference to Dean Prosser, a privacy tort protecting the interest in reputation is anomalous. Concern for reputation presupposes interaction between the person attacked and those who perceive the victim's standing in the community. Such interaction is antithetical to the idea of being let alone by society, an idea central to the concept of personal privacy.¹⁴

Second, Prosser did not fully foresee that if there is a dignitary tort protecting against appropriation of one's name, image or personality, it necessarily spawns yet another full-blown tort protecting the proprietary interest in publicity of celebrities.¹⁵ If a celebrity's name, image and persona are protected from exploitation by others without permission, the celebrity's identity takes

on economic value that he or she may exploit or not. Thus, the appropriation branch of the privacy tort itself has two branches, protection against appropriation of identity and protection of the value of celebrity.¹⁶ But Prosser's errors and oversights regarding the structure and parameters of this complex tort pale in comparison to the twisting of it by federal appeals judges sitting on the other side of San Francisco Bay.

II. THE NINTH CIRCUIT AND THE RIGHT OF PUBLICITY

A. The Vanna White Case

The tortuous treatment of the right of publicity at the hands of the United States Court of Appeals for the Ninth Circuit begins with the distress of the well-known syndicated game show personality Vanna White over a series of advertisements prepared by an agency for Samsung Electronics America, Inc. to promote its cutting edge electronic products. Each of the advertisements in the series depicted a current example of popular culture and linked it to a particular Samsung product. The ads were all set in the twenty-first century (then more than a decade in the future) and conveyed the message that the Samsung product featured would still be in use at that time. By suggesting outrageous future developments for the cultural items employed, including the replacement of game show hosts by robots, the ads were supposed to create a humorous response from readers. One reader, Vanna White, was not amused.

The advertisement that prompted Ms. White to sue Samsung and its ad agency was for Samsung VCRs. The ad depicted a robot, dressed in a wig,

⁸ See *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (1902).

⁹ See DON R. PEMBER, *PRIVACY AND THE PRESS* 58, 78, 82, 95 (1972) (providing an excellent decade by decade treatment of the historical development of the tort with particular reference to its impact on the news media).

¹⁰ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) [hereinafter Prosser].

¹¹ *Id.*

¹² PROSSER AND KEETON ON THE LAW OF TORTS 863 (W. Page Keeton et al. eds., 5th ed. 1984).

¹³ Prosser, *supra* note 10 at 400.

¹⁴ Several commentators have seen the weakness in Prosser's position. See generally Harry Kalven, Jr., *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 340-41 (1966); Melville B. Nimmer, *The Right*

Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 CAL. L. REV. 935, 963-64 (1968); Ruth F. Walden and Emile Netzhammer, *False Right Invasion of Privacy: Untangling the Web of Uncertainty*, 9 HASTINGS COMM. & ENT. L.J. 347, 348-49 (1987) (commenting on the weakness in Prosser's position).

¹⁵ See *Haelan Laboratories, Inc., v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

¹⁶ The dichotomous nature of appropriation was judicially recognized for the first time when the Second Circuit held in *Haelan* that in addition to a baseball player's right not to have his dignity injured by the unauthorized commercial use of his photograph, he also "has a right in the publicity value of his photograph" which right has pecuniary worth. *Id.* at 868.

gown and jewelry, which the agency deliberately chose to resemble Ms. White's blond hair and her style of dress. The robot was juxtaposed next to a television game show set strongly resembling the "Wheel of Fortune" set on which Ms. White worked. The ad caption read "Longest-running game show 2012 A.D." Officers and managers of the two corporate defendants referred to the advertisement as the "Vanna White" ad, though Ms. White neither consented to being involved nor received compensation in any way.

Following circulation of the ad in numerous periodicals, Ms. White brought suit in the United States District Court for the Central District of California, *inter alia*, for violation of her right of publicity. The trial judge granted summary judgment for the defendants on all of her claims. On the common law right of publicity claims, the court held that Ms. White's claim failed to satisfy California's requirement that defendants must appropriate her "name or likeness" for commercial purposes or otherwise if there is to be a violation of her right of publicity, citing *Eastwood v. Superior Court*.¹⁷

On appeal, the Ninth Circuit agreed that the robot advertisement did not make use of Ms. White's name or likeness but added that "the common law right of publicity is not so confined,"¹⁸ and reversed the trial court's summary judgment on this cause of action. Interpreting *Eastwood*, the appeals court rejected the idea that California law required a right of publicity cause of action be pleaded *only* by alleging an appropriation of name or likeness. The *Eastwood* case did involve an unauthorized use of both photographs of the actor Clint Eastwood and his name, but the Ninth Circuit said that did not mean the California court had limited right of publicity actions to those particular kinds of takings alone.¹⁹

The Ninth Circuit supported its proposition that the right of publicity of celebrities could be invaded by means other than the taking of their names and images by citing Prosser's California Law Review article, which barely mentions the right.²⁰ It quoted his statement regarding the related tort of appropriation that "[i]t is not impossible that there might be appropriation of the plaintiff's identity, as by impersonation, without the use of either his name or his likeness."²¹ The appeals court then went on to cite three examples of the violation of a celebrity's right of publicity where the violation did not involve the taking of the celebrity's name or image. They were the successful actions by singer-actress Bette Midler for the taking of her vocal sound by a sound-alike singer,²² a famous race car driver for the taking of a photograph of his distinctive car though he could not be identified as the driver in the picture²³ and Johnny Carson for the taking of his signature "Tonight Show" introduction, "Here's Johnny."²⁴ According to the court,

These cases teach not only that the common law right of publicity reaches means of appropriation other than name or likeness, but that the specific means of appropriation are relevant only for determining whether the defendant has in fact appropriated the plaintiff's identity . . . Although the defendants in these cases [*Midler*, *Motschenbacher* and *Carson*] avoided the most obvious means of appropriating the plaintiffs' identities, each of their actions directly implicated the commercial interests which the right of publicity is designed to protect.²⁵

The Ninth Circuit gave a ringing endorsement of the right of publicity in *White*. "Television and other media create marketable celebrity identity value The law protects the celebrity's sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof."²⁶ But while no one that I am aware of disagrees with the value of

¹⁷ 198 Cal. Rptr. 342, 347 (1983). *Eastwood* held that a right of publicity violation may be pleaded by alleging "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to the defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." *Id.*

¹⁸ *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993). *Compare* *Wendt v. Host Int'l. Inc.*, 125 F.3d 806 (9th Cir. 1997), *rehearing denied*, 197 F.3d 1284 (9th Cir. 1999), *cert. denied sub nom. Paramount Pictures Corp. v. Wendt*, 531 U.S. 811 (2000) (animated models of plaintiffs' characters in the television sitcom "Cheers" placed in a chain of airport bars; plaintiffs prevailed).

¹⁹ *Id.*

²⁰ Prosser, *supra* note 10, at 406-07 (citing *Haalan*, 202 F.2d 866, "[O]nce it is protected by the law . . . the plaintiff can capitalize by selling licenses . . . [which have] what has been called a 'right of publicity.'").

²¹ *Id.* at 401 n.155.

²² See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). *Compare* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied* 503 U.S. 951 (1993) (singing a sound-alike song not in Mr. Wait's repertoire).

²³ See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

²⁴ See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

²⁵ *White*, 971 F.2d at 1398.

²⁶ *Id.* at 1399.

having such right, the Ninth Circuit panel majority's application of this branch of the tort in *White* appears to extend the right beyond all reasonable boundaries and has been severely criticized both by other Ninth Circuit judges²⁷ and legal commentators.²⁸ The criticism appears to fall into three distinct but related categories.

The first category is the court's misunderstanding of past precedent. As noted above, the panel relied on *Midler*, *Motschenbacher* and *Carson* to justify extending the right of publicity beyond the appropriation of celebrity names and true photographic images in order to cover a tongue-in-cheek robot designed and clothed to remind the audience of Vanna White. But in these cases the appropriators used certain positive indicia of the celebrities involved to suggest that they freely associated themselves with and endorsed the appropriator's product.²⁹ But no such suggestion was made by the advertiser when it used a robot reminiscent of a particular celebrity simply to make a point about its product — to indicate, rather playfully, that while humans may be replaced as game show stars by non-humans in the second decade of the twenty-first century, its product will still be in style. To hold that such a reference violated Vanna White's right of publicity expands such right beyond all reason.³⁰

The expansion of the right of publicity leads directly to the second category of criticisms — the

damage to First Amendment interests. What we have in *White* is an attempt by the advertiser to parody the robotic quality of Ms. White's job, *i.e.*, revealing the previously concealed letters on a game board. But parody and mockery are valuable commodities in a society that values free expression, both for their entertainment value³¹ and, as Judge Kozinski noted in his dissent to the rejection of an en banc rehearing of the appeal in *White*, for their safety valve function.³²

By extending the protection of the right of publicity to a celebrity because a robot in an advertisement causes the audience to think of that celebrity removes from the public's intellectual domain the opportunity to mock or parody those in the public eye. That opportunity is so valuable that it is considered to be an essential component of free speech and, as such, protected by the First Amendment.³³ But a majority of the Ninth Circuit panel cavalierly dismissed the parody defense on the ground that it didn't apply to "true advertisement[s]."³⁴ The majority elaborated by saying "Defendants' parody arguments are better addressed to non-commercial parodies. The difference between a 'parody' and a 'knock-off' is the difference between fun and profit."³⁵ This facile dismissal of the reach of the First Amendment ignores the well-established proposition that commercial speech has substantial constitutional protection³⁶ and stimulates the third category of criti-

²⁷ See *id.* at 1402 (Alarcon, J., dissenting); opinion of Kozinski J. dissenting from the order of the Ninth Circuit rejecting the suggestion of rehearing en banc in *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512 (9th Cir. 1993).

²⁸ See, e.g., David S. Welkowitz, *Catching Smoke, Nailing Jell-O to a Wall: The Vanna White Case and the Limits of Celebrity Rights*, 3 J. INTELL. PROP. L. 67 (1995) (perhaps the most insightful criticism of the decision); Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control*, 45 U. KAN. L. REV. 329 (1997) (an encyclopedic treatment of the right of publicity seen through the prism of the *White* case); Linda J. Stack, *White v. Samsung Electronics America, Inc.'s Expansion of the Right of Publicity: Enriching Celebrities at the Expense of Free Speech*, 89 NW. U. L. REV. 1189 (1995) (a perceptive discussion of *White's* harmful impact on First Amendment protection); John R. Braatz, *White v. Samsung Electronics America: The Ninth Circuit Turns a New Letter in California Right of Publicity Law*, 15 PACE L. REV. 161 (1994); Gretchen A. Pemberton, *The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity*, 27 U.C. DAVIS L. REV. 97 (1993); John F. Hyland & Ted C. Lindquist III, *Torts: White v. Samsung Electronics America, Inc.: The Wheels of Justice Take an Unfortunate Turn*, 23 GOLDEN GATE U. L. REV. 299 (1993). See also William M. Borchard, *The Common Law Right of Publicity is Going Wrong in the United States: Waits v. Frito-Lay and White v. Samsung Electronics*, 3 ENT. L. REV. 208 (1992) (criticism of

Ninth Circuit's right of publicity decisions from abroad).

²⁹ See Welkowitz, *supra* note 28, at 77-79.

³⁰ As Professor Welkowitz frames it, "[w]hen the advertisement seeks to associate the positive values of the celebrity with the product, a use of the commercial value may be occurring. But where the celebrity is merely a point of reference, the celebrity's commercial value is not being used." *Id.* at 79-80. See *Cher v. Forum Int'l. Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983) (falsely implied endorsement of products).

³¹ See, e.g., Gretchen A. Pemberton, *The Product's Claim to Fame: A Parody Exception to the Right of Publicity*, 27 U.C. DAVIS L. REV. 97, 140 (1993) ("Parodies of celebrities are not just something that should be permitted. They should be encouraged, and parodists should be rewarded. We need the commentary. We need the laughter.").

³² *White*, 989 F.2d at 1516-17.

³³ See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51-52 (1988) (parody of a liquor ad campaign on celebrity "first times" they tried Compari featuring the Reverend Jerry Falwell engaging in an incestuous act in an outhouse).

³⁴ *White*, 971 F.2d at 1401.

³⁵ *Id.*

³⁶ See, e.g., *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *City of Cincinnati v. Discovery Network*,

cism.

That category involves the failure of the panel to perform the Supreme Court's mandated analysis to determine whether the particular limitation on commercial speech meets constitutional muster. The Supreme Court's requirements justifying limitation or suppression of commercial speech are set down in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n.*³⁷ The four-part ad hoc balancing test includes determining (1) whether the expression to be limited promotes legal products, services or activities and is truthful and not misleading;³⁸ (2) whether the government has a substantial interest in prohibiting or limiting the commercial speech;³⁹ (3) whether the restriction on expression directly advances the state interest involved;⁴⁰ and (4) whether the restriction is only as broad as necessary to advance the state's interest.⁴¹

Since the purpose of this essay is not to plow the same ground worked by earlier critics of the *White* decision (and they are legion) but rather to demonstrate that in the context of a later Ninth Circuit decision⁴² that *White* is quite indefensible, I will not indulge in a detailed application of the four-part *Central Hudson* test,⁴³ but rather will confine myself to two observations concerning the commercial speech doctrine. First, I submit the governmental interest in extending the right of publicity to include mere evocation of a celebrity's existence through parody or otherwise is very thin and, in order to advance this interest, to suppress a whole category of commercial speech, *i.e.*, parody of celebrities in advertising, is much too extreme to be constitutionally justified. Second, regardless of how one might apply the four-part test, the fact that the panel neglected even to make an effort at application, severely undermines any claim the decision might have to being in harmony with the First Amendment. It is simply not good enough to say, "Defendants' parody arguments are better addressed to non-commercial parodies."⁴⁴

Further critical analysis of *White* could be indulged in, but the main failing of *White* is that it provides too much protection for the pecuniary interests of celebrities in derogation of First Amendment interests and the decision becomes ludicrous when compared with the next case to be discussed, *Hoffman v. Capital Cities/ABC, Inc.*⁴⁵ in which too little protection is accorded by the appeals court to a celebrity of far greater magnitude than Vanna White. In comparing the two cases, one is tempted to suggest the analogy of a baseball umpire who blows a call and then attempts to make amends to the team disadvantaged by shading another call, this time in favor of the previously disadvantaged team.

But two wrong calls don't make a right (of publicity).

B. The Dustin Hoffman Case

Straight male celebrities sometimes appear in front of the public wearing female attire, usually for some good dramatic reason and, of course, voluntarily. For instance, Jack Lemmon and Tony Curtis as members of an all-female band in the classic Billy Wilder comedy "Some Like It Hot" or Dustin Hoffman as a female soap opera actress in another classic comedy "Tootsie." Needless to say, no one forced these actors to appear "in drag." But that was not the case when Mr. Hoffman's face appeared in a photographic spread on current fashion in *Los Angeles Magazine* ("LAM" or "the magazine").

In *Hoffman v. Capital Cities/ABC, Inc.*,⁴⁶ the magazine, to "rev up" its media profile,⁴⁷ published an article entitled "Grand Illusions" with accompanying computer doctored photographs making it appear that famous Hollywood actors and actresses, mostly deceased, were wearing Spring 1997 fashions. One of the photographs was a publicist shot of Dustin Hoffman as "Tootsie" in a red long-sleeved sequined evening dress and high heels, posing in front of a large American flag.

Inc., 507 U.S. 410 (1993); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); see also Langvardt, *supra* note 28, at 413, 432; Stack, *supra* note 28, at 1209-22.

³⁷ 447 U.S. 557 (1980).

³⁸ *Id.* at 564, 566.

³⁹ *Id.* at 564.

⁴⁰ *Id.*

⁴¹ *Id.* at 565.

⁴² *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

⁴³ Welkowitz, *supra* note 28 at 437-38; Stack, *supra* note 28, at 1209-18; Joshua Waller, *The Right of Publicity: Preventing the Exploitation of a Celebrity's Identity or Promoting the Exploitation of the First Amendment?*, 9 UCLA ENT. L. REV. 59, 83-84 (2001).

⁴⁴ *White*, 971 F.2d at 1401.

⁴⁵ 255 F.3d 1180 (9th Cir. 2001).

⁴⁶ *Id.*

⁴⁷ *Id.* at 1186.

They still carried the text, "What do you get when you cross a hopelessly straight, starving actor with a dynamite red sequined dress? You get America's hottest new actress."⁴⁸

In its March 1997 issue, LAM, then owned by Capital Cities/ABC, Inc. and now owned by the Walt Disney Company, published the still but had it altered, replacing Hoffman's body (but retaining his face) and replacing the long-sleeved red sequined dress and pumps with a spaghetti-strapped, cream-colored, silk evening dress and high-heeled sandals. LAM also omitted the original caption accompanying the "Tootsie" still. The text accompanying the computer altered image read, "Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels."⁴⁹ LAM did not ask permission of Hoffman to publish the altered photograph depicting his face or of Columbia Pictures Corporation, the original still's copyright owner.⁵⁰

Like Vanna White, Hoffman was not amused and brought suit in state court, from which it was removed to the United States District Court for the Central District of California. Hoffman claimed, *inter alia*, that the unauthorized use of his image in the magazine as part of a contrived female fashion spread violated his California right of publicity.⁵¹ After a bench trial, the district court ruled for the screen actor on all of his claims and awarded him \$1,500,000 in compensatory damages and \$1,500,000 in punitive damages.⁵²

On appeal, LAM argued that its use of the "Tootsie" still was protected by the First Amendment. The Ninth Circuit agreed with this contention and reversed the judgment of the district court leaving Hoffman and his counsel empty handed. The appeal court's theory was that com-

mercial speech, which has lesser First Amendment protection, is very narrow in scope having as its core speech that "does no more than propose a commercial transaction."⁵³ And since the appropriation of Hoffman's visage was for an editorial feature and not an advertisement or commercial (as in *White*), the full force of the First Amendment applies to protect this use, no matter that some of the manufacturers and sellers of the fashions featured in the spread also advertised in the magazine, and the magazine provided a handy buyers guide listing where the particular evening gown and shoes purportedly worn by Hoffman could be purchased.⁵⁴ As the court said, "These facts are not enough to make the 'Tootsie' photograph pure commercial speech. If the altered photograph had appeared in a Ralph Lauren advertisement, then we would be facing a case much like those cited above [proposing commercial transactions and clearly commercial speech]."⁵⁵

Thus, for the Ninth Circuit, the touchstone for protection of a celebrity within its jurisdiction including Hollywood, is whether the celebrity's name, image, look-alike, sound-alike or robot-alike is appropriated for an ad or broadcast commercial proposing a commercial transaction. That, of course, is the core of commercial speech. No other appropriation, even one just a step removed from the core, as in *Hoffman*, will be considered actionable as a form of invasion of privacy because it receives the full protection of the First Amendment.⁵⁶

I submit the Ninth Circuit panel takes too crabbed a view of the boundaries of commercial speech and too broad a view of what the First Amendment protects. First, the United States Supreme Court has taken a broader view of commer-

⁴⁸ *Id.* at 1182-83.

⁴⁹ *Id.* at 1183.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1184 (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983)).

⁵⁴ *Id.* at 1184-85.

⁵⁵ *Id.* at 1185. The cases referred to by the court were *Newcombe v. Adolph Coors Co.*, 157 F.3d 686, 691 (9th Cir. 1998) (use of a pitcher's image in a beer ad); *Abdul-Jabbar v. General Motors Corp.* 85 F.3d 407, 409 (9th Cir. 1996) (use of a basketball player's former name in a television automobile commercial); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097-98 (9th Cir. 1992) (use of a sound-alike in a commercial); *White v. Samsung Electronics of America, Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992); *Midler v. Ford Motor Co.*,

849 F.2d 460, 461 (9th Cir. 1988) (use of a sound-alike of the famous singer Bette Midler singing a Midler song in a commercial).

⁵⁶ The court did suggest that when the right of privacy is trumped by the First Amendment, the celebrity might make out a case of knowingly false speech if he or she can establish by clear and convincing evidence that the false expression was made with actual malice under the doctrine of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Hoffman*, 255 F.3d at 1186-88. Unfortunately for Dustin Hoffman, the court did not think the actor had made out such a case, but then he and his counsel apparently did not think they were playing the "actual malice" game since they never asserted an action for defamation. *Id.* at 1183. I will not belabor this aspect of the court's ruling because my interest here is only the right of publicity privacy claim.

cial speech. In *City of Cincinnati v. Discovery Network, Inc.*,⁵⁷ the Discovery Network placed a number of magazine racks on public property with the city's permission containing free magazines describing the Network's many adult educational, recreational and social programs.⁵⁸ Within a year the city revoked permission and ordered the news racks removed.⁵⁹ The Network fought the removal order and won in every federal court up to, and including the United States Supreme Court.⁶⁰ The High Court concluded (among other things) that the controversy over the placement of the racks to distribute the promotional literature involved commercial speech, quoting approvingly and at length from Justice Blackmun's opinion in perhaps the Court's strongest commercial speech decision.⁶¹

In *Discovery Network*, the placement of the magazine racks that was at issue, and that issue was at least one step removed from the Network "proposing a commercial transaction."⁶² In *Bolger v. Youngs Drug Products Corp.*,⁶³ the Court also dealt with material outside the core. There the Court considered, among other things, two mailings of informational pamphlets which discussed human sexuality and venereal disease but also made mention of contraceptive products, products produced by Youngs Drug Products Corporation.⁶⁴ Despite the fact that the pamphlets had contained discussion of major public issues and thus outside the core, the Court held that the expression involved was commercial speech.⁶⁵

Also important to the determination of the boundaries of commercial speech is the decision of the California appeals court in *Keimer v. Buena Vista Books, Inc.*⁶⁶ The District Court of Appeals for the First District held that a complaint alleging

false statements made on book and videotape covers reiterating verifiably false factual statements contained in the books and videotapes themselves, amounted to commercial speech and, accepting the allegations of the complaint as true in testing for its sufficiency, the falsity of the statements would strip this commercial speech of any First Amendment protection.⁶⁷ In *Keimer*, the infamous "Beardstown Ladies" investment group claimed (falsely as it turned out) in numerous books and a videotape produced by Disney owned companies that it had "23.4% annual return" on its investments.⁶⁸ Displayed prominently on the front and back covers and the packaging of these materials there often appeared statements such as "23.4% ANNUAL RETURN" and "learn how to outperform mutual funds and professional money managers 3 to 1."⁶⁹

While obviously intended to attract buyers, the statements taken from the text did not directly propose a commercial transaction and indeed, might also have attracted readers in free public lending libraries. Nevertheless, the California court held the cover blurbs were commercial speech.⁷⁰ And, accepting the allegations of their falsity for purposes of the appeal from the grant of the demurrer below, the court further held that the limited protection of such speech was determined by *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n.*⁷¹ According to the appeals court, this commercial speech did not even meet the threshold requirement of *Central Hudson*, i.e., that it not be false or misleading.⁷² Therefore, if the plaintiff were to establish the falsity of the book and video cover statements at trial, he could obtain an injunction and disgorgement of profits under California's Unfair Trade Practices Act.⁷³

⁵⁷ 507 U.S. 410 (1993).

⁵⁸ *Id.* at 412.

⁵⁹ *Id.* at 413.

⁶⁰ *Id.* at 414-15.

⁶¹ *Id.* at 420-21 (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 761-62).

⁶² It is, of course, true that the Supreme Court held that the placement of the racks under the circumstances of the case was protected by the First Amendment. However, if those circumstances had been less favorable as, for instance, the racks seriously compromised public safety because placed on sidewalks too close to fire hydrants, the First Amendment would not protect the racks. But that would not have changed the nature of the Network's means of expression as commercial speech. In other words some commercial speech is protected and some is not. See *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n.*, 447 U.S. 557 (1980).

⁶³ 463 U.S. 60 (1983).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 89 Cal. Rptr. 2d 781 (2000), *rev. denied*, 2000 Cal. LX 1740 (2000); *contra* *Lacoff v. Buena Vista Pub., Inc.*, 183 Misc. 2d 600, 705 N.Y.S.2d 183 (2000) (N.Y. Sup. Ct.). But then as my venerable wills instructor Thomas Atkinson once said to my class, "You can find anything in the New York Miscellaneous Reports."

⁶⁷ *Keimer*, 89 Cal. Rptr. 2d at 790.

⁶⁸ *Id.* at 782.

⁶⁹ *Id.* at 783.

⁷⁰ *Id.* at 788.

⁷¹ 447 U.S. 557 (1980).

⁷² *Keimer*, 89 Cal. Rptr. 2d at 788. See *Central Hudson*, 447 U.S. at 564, 566 (1980).

⁷³ BUS. & PROF. CODE §§17200, 17500 (West 1997).

In *Hoffman*, the Ninth Circuit was confronted with a similar kind of non-core commercial speech but did not recognize it. While the "Grand Illusions" piece in LAM did not directly propose a commercial transaction, the piece was supportive of at least one advertiser who was proposing commercial transactions in its pages and the magazine conveniently provided a "Shopper's Guide" in the back of the magazine.⁷⁴ This reflects that the material is non-core commercial speech given a lesser degree of First Amendment protection under *Central Hudson*. And at least with regard to the living celebrities depicted, this non-core commercial speech is demonstrably false. That the readers might know that the Hoffman / "Tootsie" photograph had been altered because the magazine printed a small copy of the unaltered "Tootsie" still is beside the point.⁷⁵ The doctored image of Dustin Hoffman included in the spread necessarily gives the impression to the reader that the actor voluntarily associated himself with this publishing charade. Nothing could be further from the truth. Under *Central Hudson*, the use of Hoffman's face here has no First Amendment protection, therefore it is misleading and has no substantial public purpose. The Ninth Circuit was wrong once again in a right of publicity case, this time in preventing the celebrity from recovering damages for the demeaning use of his doctored image without permission.

The real gravamen of the Ninth Circuit's decision is not that Dustin Hoffman will have a few million dollars less in his bank account but rather the stripping of control from celebrities of their names and images; they can now be exploited by media types out to create a "buzz" for their enterprises in a manner other than traditional advertising. Given that there are more celebrities worth exploiting within the confines of the Ninth Circuit than within any other federal circuit, this er-

roneous decision will have far greater impact on the celebrity population than would a similar decision from the Tenth Circuit.⁷⁶ It will also almost surely have a greater impact on other courts because of the belief that the Ninth Circuit judges must know what they are doing in right of publicity cases because they have so many of them. After all, practice makes perfect. Or does it?

Apparently not, for in *Downing v. Abercrombie & Fitch*,⁷⁷ faced with essentially the same situation as in *Hoffman*, the court, slightly more than two months later, ruled for the plaintiff.⁷⁸ There, Abercrombie & Fitch, an upscale retailer of casual apparel for men and women and publisher of a quarterly subscription catalog consisting of approximately 75% advertising of its wares and 25% stories, news and other editorial content, printed a photograph of a number of competitors at the 1965 Makaha International Surf Championship in Hawaii as part of a section of its quarterly, entitled "Surf Nekkid."⁷⁹ The section included an article recounting the history of surfing and another entitled "Your Beach Should Be This Cool," describing the history of Old Man's Beach at San Onfre, California.⁸⁰ The following page included the photograph of the plaintiffs wearing distinctive T-shirts. Following the pictures were two pages advertising specially manufactured T-shirts like those worn by the surfers. The surfing section contained other articles as well.⁸¹

The photograph had been purchased from the photographer by Abercrombie employees specially for the quarterly "essentially as window-dressing to advance the catalog's surf-theme."⁸² Permission to use their images was not obtained from the competitors and they brought suit claiming, among other things, misappropriation of their names and likenesses for commercial purposes under California common law.⁸³

The United States District Court for the Central

⁷⁴ *Hoffman*, 255 F.3d at 1185.

⁷⁵ *Id.* at 1187.

⁷⁶ One commentator begs to differ as to the correctness of the *Hoffman* case. See Landis C. Best, *Ninth Circuit Limits Right of Publicity Claims*, 19 COMM. LAWYER 1 (Fall 2001). While agreeing that the right of publicity has had a tortuous existence, Best believes that it is akin to copyright protection which has more First Amendment protections built in for those who copying others' intellectual work and that it is a welcome development that the Ninth Circuit has broadened First Amendment protection in right of publicity cases.

First Amendment principles . . . provide the tort with the necessary breathing space to allow comment, criticism

and artistic expression regarding such celebrities who play important roles in the American cultural landscape. *Hoffman* is a refreshing example of a court striking the right balance.

Id. at 18. It should be kept in mind that Communication Lawyer is essentially a publication for media defense lawyers.

⁷⁷ 265 F.3d 994 (9th Cir. 2001).

⁷⁸ *Id.* at 999.

⁷⁹ *Id.* at 1000.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 1002 (the Ninth Circuit's characterization).

⁸³ *Id.* at 1003.

District of California granted summary judgment to the defendant retailer, concluding that the use of the plaintiff surfers' names and likenesses constituted expression protected under the First Amendment.⁸⁴ The Ninth Circuit disagreed, holding that while "no cause of action will lie for the publication of matters in the public interest,"⁸⁵ publication here significantly contributed to a matter of the public interest as the defendants claimed.

In the current action, there is a tenuous relationship between Appellants' photograph and the theme presented. Abercrombie used Appellants' photograph essentially as window-dressing to advance the catalog's surf-theme. The catalog did not explain that Appellants were legends of the sport and did not in any way connect Appellants with the story preceding it.⁸⁶

The appeals court did refer to its recent *Hoffman* decision in a footnote,⁸⁷ distinguishing it on the basis that LAM was unconnected to, and received no consideration from the designers for the gown illustrated in the article and the magazine merely referenced a shopping guide that provided stores and prices for the gown. The Ninth Circuit panel's distinction of *Hoffman* is based on the degree of commerciality involved but does not come to grips with the issue of whether the false image of the actor in a magazine "contribute[s] significantly" (in the court's own words) to a matter of public interest.⁸⁸

What substantial contribution to a matter of public interest can be found in a celebrity's image? This is the critical First Amendment question in both cases. The *degree* of commerciality of the publications in which the appropriated images of the celebrities involved is at best relevant only as to whether the commerciality has a substantial First Amendment component. Some commercial speech is of public importance such as the discussion in a pamphlet of the societal value of a company's condoms in *Bolger v. Youngs Drug Products Corp.*⁸⁹ Other commercial speech is devoid of substantial public interest such as the price of toothpaste in a newspaper ad. The integration of the appropriated celebrity's name and image in a

magazine article having a commercial purpose to promote merchandise featured in the article is no different from the unauthorized use of a celebrity's name and image in a catalog as "window-dressing."⁹⁰ The question for First Amendment protection is always whether the unauthorized use of another's name or image substantially contributes to a matter of public interest, and like the photograph of surfers in a catalog, the doctored image of Dustin Hoffman in women's clothing for a fashion spread in a magazine does not. Despite the effort to distinguish the two cases, the *Downing* panel got it right and the *Hoffman* panel got it wrong.

III. THE NINTH CIRCUIT AND THE TORT OF INTRUSION

While less potential damage is likely to be done by the Ninth Circuit regarding the tort of intrusion, it has sown confusion with two recent opinions regarding this relatively simple branch of invasion of privacy.

This tort is defined by the Restatement Second in the following manner: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."⁹¹ As is clear from the Restatement definition, this privacy tort – unlike the right of publicity – does not directly involve publication of any material concerning complaining parties. It does, however, impact the news and information gathering process which is the lifeblood of the news media, particularly investigative reporting.

One key to determining if the particular news and information gathering amounts to actionable intrusion is whether the target of the information gathering has an objectively reasonable expectation of privacy given the place of the alleged intrusion.⁹² Thus, one's home,⁹³ office,⁹⁴ hospital or

⁸⁴ *Id.* at 1002-03.

⁸⁵ *Id.* at 1001 (quoting *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793 (1995)).

⁸⁶ *Id.* at 1002.

⁸⁷ *Id.* at 1002, n.2.

⁸⁸ *Id.* at 1002.

⁸⁹ 463 U.S. 60 (1983).

⁹⁰ *Downing*, 265 F.3d at 1002.

⁹¹ RESTATEMENT (SECOND) OF TORTS §652B (1977).

⁹² See, e.g., *Shulman v. Group W Prod., Inc.*, 955 P.2d 469, 490 (1998); *Tobin v. Michigan Civil Serv. Comm'n*, 331 N.W.2d 184, 189 (1982); *People for the Ethical Treatment of Animals v. Bobby Berósini, Ltd.*, 895 P.2d 1269, 1279-81 (1995); RESTATEMENT (SECOND) OF TORTS §652B, cmt. c (1977).

⁹³ See, e.g., *Miller v. National Broad. Co.*, 187 Cal. App. 3d 1463, 1483-85 (1986) (private apartment).

⁹⁴ See generally *Dietemann v. Time, Inc.*, 449 F.2d 245

hotel room,⁹⁵ all of which can be secured to keep society out, are such places. On the other hand, when one is in public or can be easily observed from a public place, the courts hold that the party observed has no reasonable expectation of privacy and there is no actionable intrusion.⁹⁶

A. *Deteresa v. American Broadcasting Companies, Inc.*

The Ninth Circuit confronted this aspect of invasion of privacy in *Deteresa v. American Broadcasting Co., Inc.*⁹⁷ and got it right, but not for long. Pursuing the O.J. Simpson murder prosecution story, a producer for American Broadcasting Companies, Inc. ("ABC") came to the door of Beverly Deteresa's condominium in Irvine, California. Ms. Deteresa was one of the flight attendants on the flight Mr. Simpson took to Chicago shortly after Nicole Brown Simpson and Ronald Goldman were murdered at Ms. Simpson's Los Angeles home. When she opened the door, the producer told Ms. Deteresa that he worked for ABC and wanted to speak with her about appearing on his network to discuss the flight. Ms. Deteresa asked for identification and the newsman produced an ABC photo identification card. Ms. Deteresa initially said she was not interested in appearing on the producer's show but added that she was "frustrated" to hear news reports about the flight that she knew were false. She informed the producer that Simpson had not kept his hand in a bag during the flight. She also informed him as to the exact seat Simpson occupied in the first class section. The producer called Ms. Deteresa the next day asking her again to appear on television. When she declined, he told her that he had audio-taped their entire conversation the previous day. He also had an ABC cameraperson videotape them as they talked at the doorway. Ms. Deteresa hung up on the producer and told her husband

what had transpired. He called the producer and told him that his wife did not want ABC to air the videotape. The producer replied that ABC did not need the wife's consent to broadcast the videotape. Ms. Deteresa's husband also asked that ABC not broadcast their address, Ms. Deteresa's name or the audiotape.

That evening ABC broadcast a five-second clip of the videotape on a program called "Day One." Simultaneous with this clip, a network announcer stated that "the flight attendant who served Simpson in the first class section told 'Day One' that she did not, as widely reported, see him wrap his hand in a bag of ice."⁹⁸ ABC did not broadcast the audiotape that the show's producer had surreptitiously made.

Ms. Deteresa filed an action in the United States District Court for the Central District of California claiming, *inter alia*, that ABC had engaged in physical intrusion on her solitude or into her private affairs.⁹⁹ The trial court entered summary judgment for ABC on all claims and Ms. Deteresa appealed. A panel of the Ninth Circuit affirmed the summary judgment.

On the common law claim of intrusion, the panel held that under the facts of the case, Ms. Deteresa had no reasonable expectation of privacy or, at most, the defendants' conduct had only an insubstantial impact on her privacy interests and therefore, as a matter of law, neither the videotaping or the audiotaping tortuously invaded her privacy.¹⁰⁰ While the appeals court discussed the reasonable expectation of privacy issue in relation to the California Eavesdropping Statute,¹⁰¹ that discussion is equally relevant to the common law tort claim of intrusion. The panel pointed to the facts that the producer revealed that he worked for ABC and wanted Ms. Deteresa to appear on television to discuss the flight; Ms. Deteresa did not tell the producer that her statements concerning the flight were in confidence;

(9th Cir. 1971) (office).

⁹⁵ See, e.g., *Barber v. Time, Inc.*, 159 S.W. 2d 291 (1942) (hospital room); *Estate of Berthiaume v. Pratt*, 365 A.2d 792 (Me. 1976) (hospital room); see also *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 491 (1998) (rescue helicopter).

⁹⁶ See, e.g., *Shulman*, 955 P.2d at 490 (automobile accident scene); *Ross v. Burns*, 612 F.2d 271 (6th Cir. 1980) (narcotics agent photographed in public near a courthouse by newspaper reporters); cf. *Jaubert v. Crowley Post-Signal, Inc.*, 375 So.2d 1386 (La. 1979) (owner's "weather worn and unkempt" home photographed from public street); RESTATE-

MENT (SECOND) OF TORTS §652D, cmt. b (1977).

⁹⁷ 121 F.3d 460, 465-66 (9th Cir. 1997).

⁹⁸ *Id.* at 463.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 465-66 (quoting *Sanders v. American Broad. Cos., Inc.*, 60 Cal. Rptr. 2d 595, 598 (1997) ("If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law."), *reversed and remanded to* 978 P.2d 67 (Cal. 1999)).

¹⁰¹ CAL. PEN. CODE §632 (West 1999).

she did not tell him that the conversation was just between them; she did not request that the producer not share the information with anyone else; and the producer did not promise Ms. Deteresa that he would keep what she told him in confidence. From these undisputed facts, the panel concluded "that no one in Deteresa's shoes could reasonably expect that a reporter would not divulge her account of where Simpson had sat on the flight and where he had or had not kept his hand."¹⁰²

On the issue of whether any intrusion that might have occurred would be actionable, the panel first addressed the videotape. Ms. Deteresa did not dispute that she was videotaped in public view by a cameraperson situated in a public place and that ABC broadcast only a five-second clip which did not include either her name or her address. Under these circumstances any intrusion from the videotaping was *de minimis* and no tort action would lie.¹⁰³

As for the audiotaping, the panel found that intrusion was not objectively offensive. Ms. Deteresa spoke voluntarily and freely to a person who had identified himself as a newsperson. He did not enter her home to make the audiotape, which was never broadcast and no intimate details of anyone's life were recorded. Under these circumstances, the panel held that the intrusion was not sufficiently offensive to state a common law intrusion privacy claim.¹⁰⁴

These rulings are consistent with settled law and common sense. Any sentient person must know that when one chooses to talk to a news gatherer without clear restriction, what that person says may well be published. It is the nature of news gatherers to disclose what they glean. One simply can have no expectation of privacy when making unrestricted disclosures such as those made by Ms. Deteresa. As for the requirement of offensiveness of the intrusion, the complaining party needs to show some nastiness on the part of the defendant and not her own mere hurt feelings. For example, it was considered offensive for a magazine photographer to enter the hospital room of a patient with an exotic disease and take

her photograph without permission and against her will.¹⁰⁵ Thus, the Ninth Circuit got this intrusive invasion of privacy case right but unfortunately it did not quit while it was ahead.

B. *Alpha Therapeutic Corporation v. Nippon Hoso Kyokai*

In *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*¹⁰⁶ another broadcasting company, this time Japanese, was also alleged, among other things, to have intruded on the privacy of Alpha Therapeutic ("Alpha"), a producer of blood plasma derivatives. A four-minute news story produced by Nippon Hoso Kyokai ("NHK") promoting two subsequent hour-long programs about Alpha was aired twice in the United States on a Japanese language channel. NHK had developed the programs and the news story from 15,000 pages of confidential, internal documents belonging to Alpha. Alpha had disclosed these documents pursuant to a protective order solely in connection with unrelated litigation pending in a United States federal district court. NHK received bootleg copies of these documents from an unnamed source. NHK employees then followed up by interviewing a number of Americans including the plaintiff, Clyde McAuley. The reporter interviewing McAuley went to his home unexpectedly and when he answered the door, began asking him questions. McAuley had not agreed to be interviewed in advance by NHK but apparently knew that the interviewer was a newsperson because he did not allege in his complaint that he was unaware that the person talking to him was a reporter. The reporter wore a hidden microphone on his necktie, and a camera operator and sound technician sat in a van parked in the street in front of McAuley's house. McAuley did not know that the interview was being recorded and at no time during the interview did he consent to being recorded on audio or videotape.

This interview was included in NHK's "Hour Long Program." McAuley and Alpha brought suit in California state court claiming, *inter alia*, that the interview constituted the tort of intrusion.

¹⁰² *Deteresa*, 121 F.3d 460 at 465.

¹⁰³ *Id.* at 466. Compare *Aisenon v. ABC*, 220 Cal. App. 3d 146, 269 Cal. Rptr. 379 (1990) (relied on by the panel in *Deteresa*).

¹⁰⁴ *Id.* at 465-66.

¹⁰⁵ See *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W. 2d

291 (1942); see also *Estate of Berthiaume v. Pratt*, 365 A.2d 792 (Me. 1976) (physician entered hospital room to take photograph of a dying man without permission).

¹⁰⁶ 199 F.3d 1078 (9th Cir. 1999), *opinion withdrawn*, 237 F.3d 1007 (9th Cir. 2001).

NHK removed the case to federal district court where the trial judge dismissed the invasion of privacy count because it did not state a claim for relief.¹⁰⁷

On appeal, the Ninth Circuit panel, without citing *Deteresa*, reversed, holding that even assuming McAuley knew he was speaking with a reporter, he could still state a claim for invasion of privacy because "a person may reasonably expect privacy against the electronic recording of a communication, even though he or she had no reasonable expectation as to confidentiality of the communication's contents."¹⁰⁸ But the same could be said for Ms. Deteresa. She was audio and videotaped initially without her knowledge though she knew she was talking to a television newsperson. What makes the panel's *Alpha Therapeutic* ruling on intrusion even more bizarre is that one judge, Diarmuid F. O'Scannlain, was common to both the *Deteresa* and *Alpha Therapeutic* panels.

What could have happened between *Deteresa* in July of 1997 and *Alpha Therapeutic* in December of 1999 to make for such a surprising U-turn? The only happening that might conceivably explain it is the California Supreme Court's decision in *Sanders v. American Broad. Cos., Inc.*¹⁰⁹ in June of 1999 and relied upon by the Ninth Circuit panel. In *Sanders*, yet another case involving ABC, a reporter for the network, Stacy Lescht, obtained employment as a "telepsychic" with Psychic Marketing Group ("PMG"), which also employed plaintiff Mark Sanders in that same capacity. Lescht's apparent purpose in accepting this job while still a reporter for ABC was to document any wrongdoing by the company. To that end Lescht wore a small video camera hidden in her hat and secretly videotaped her conversations with several coworkers, including Sanders.

When Sanders found out about the videotaping, he sued Lescht and ABC for, among other causes of action, the tort of intrusion. Sanders obtained a judgment on the intrusion claim but it was reversed by the District Court of Appeals. The appellate court's ruling was based on the ground

that the jury's verdict for the defendants on another cause of action, the California Eavesdropping Statute,¹¹⁰ established that Sanders could have had no reasonable expectation of privacy in his workplace conversations because they could be overheard by others in the common office space.¹¹¹

The California Supreme Court granted review to determine whether the fact that workplace interactions might be witnessed by others on the premises necessarily defeats, for purposes of tort law, a reasonable expectation of privacy the participants have against covert videotaping by a journalist.¹¹² The Supreme Court held that it did not and reversed the Court of Appeals.

The Supreme Court reasoned that the Sanders-Lescht conversations could only be overheard by coworkers. There was no evidence that the public was invited into the PMG Los Angeles office or that the office was visited by the press or subject to videotape surveillance by the mass media. Therefore, workers in the PMG workplace had a reasonable expectation that their conversations would not be covertly videotaped by members of the press or others even when the workers knew their coworkers might overhear them. Summing up, the Court said, "[T]he fact that coworkers may have observed a workplace interaction does not as a matter of law eliminate all expectations of privacy the participants may reasonably have had vis-à-vis covert videotaping by a stranger to the workplace."¹¹³

The *Sanders* court takes a fairly novel approach to the issue of reasonable expectation of privacy in intrusion cases.¹¹⁴ The Ninth Circuit panel, without critical analysis of whether the California Supreme Court's approach was applicable to the facts of *Alpha Therapeutic*, seized upon certain language in *Sanders* to aid it in reaching its doubtful decision: "[A] person may reasonably expect privacy against the electronic recording of a communication even though he or she had no reasonable expectation as to confidentiality of the communication's contents."¹¹⁵ The Ninth Circuit panel fur-

¹⁰⁷ *Id.* at 1083.

¹⁰⁸ *Id.* (quoting *Sanders*, 978 P.2d at 72).

¹⁰⁹ *Id.*

¹¹⁰ CAL. PENAL CODE §632 (West 1999).

¹¹¹ *Sanders*, 60 Cal. Rptr. 2d 595, 598 (1997).

¹¹² *Sanders*, 978 P.2d at 69.

¹¹³ *Id.* at 78.

¹¹⁴ Compare *Shulman v. Group W Prods., Inc.*, 955 P.2d

469, 491-93 (1998). Though *Sanders* represents a novel approach to newsgathering intrusion, it is generally applauded by one student commentator. See Nathan D. Leadstrom, *Sanders v. American Broadcasting Companies, Inc.; Does it Mean the End to the Use of Hidden Cameras in Undercover Media Investigations?*, 40 WASHBURN L.J. 143 (2000).

¹¹⁵ *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078, 1089 (quoting *Sanders*, 978 P.2d at 72) (emphasis

ther quotes the California Supreme Court as saying:

[Although] one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the second hand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device.¹¹⁶

Though the panel's choice of quotes captures the essence of the California Supreme Court's thinking, that thinking is not applicable to *Alpha Therapeutic*. It is one thing to know that coworkers may overhear you and have your words repeated in limited conversation, but not know that someone from the mass media is recording those same words for later mass distribution. It is quite another to know that you are talking to a representative of the mass media though you do not know you are being recorded.

The Ninth Circuit fails to credit the intelligence of the individuals interviewed here. Who does not know that when a newsperson gets answers to questions, he or she may publish them far and wide regardless of whether they have been electronically recorded? The interviewer may even possess a phonographic memory though no tape recorder.

When one is knowingly interviewed by a journalist and voluntarily chooses to give out information, one can have no expectation of privacy as to that information whether or not the journalist is covertly recording the conversation.¹¹⁷ That is the teaching of *Deteresa* and nothing in the facts of *Sanders* requires a different result.

IV. DAMAGE ASSESSMENT

A. The Damage

The Ninth Circuit's interpretation of common law invasion of privacy has created vast confusion, particularly regarding the right of publicity. Along the West Coast where so many celebrities dwell, the parameters of the tort are no longer clear. When one goes beyond the classic appropriation of another's name or image for an advertisement or commercial, one cannot be sure whether a taking of celebrity is actionable or is protected by the

First Amendment. The *White* case implies that if one simply brings to mind a particular celebrity in a commercial setting without using that celebrity's name or image or associative value, an actionable invasion of privacy occurs and the First Amendment's protection of satire and parody does not apply. But is this truncation of the First Amendment acceptable in constitutional jurisprudence? Because *White* pushes the envelope to such an extreme, can anyone tell if it really protects celebrity interests or is—as so many commentators have suggested—a bad call that needs correction?¹¹⁸ Certainly as it stands it cannot help but chill commercial speech that makes indirect reference to celebrities without their leave or the leave of their estates. But no one knows just how indirect an ad writer has to be before the Ninth Circuit's version of the First Amendment will protect his or her creative expression relative to celebrity.

And even the Ninth Circuit appears to be conflicted by *White*, for it has over-compensated for the over-protection of celebrity there by cutting back on protection of celebrity image elsewhere as in *Hoffman*. In the process, the appeals court has created uncertainty about the parameters of commercial speech. Before *Hoffman* no one had expressed the belief that commercial speech was *limited* to the direct proposal of a commercial transaction. But that is exactly what the Ninth Circuit panel held in order to allow some slick magazine editors to utilize, without permission, Dustin Hoffman's image to enhance their magazine's image as a "revved up" advertising medium.

As a result of the *Hoffman* decision Hollywood celebrities are stripped of control of their own names and images when someone wishes to make use of them and does so with a veneer of "editorial content." There is uncertainty here, too, for both celebrities and media types because they can never know at the time of the appropriation how thin the veneer must be before the First Amendment ceases to protect the appropriation.

The damage wrought by *Hoffman* may extend far beyond Hollywood and the West Coast. Other courts may be persuaded to follow the *White* and *Hoffman* precedents, feeling that the Ninth Circuit

added).

¹¹⁶ *Id.*

¹¹⁷ See Leadstrom, *supra* note 114, at 155 ("When the plaintiff voluntarily gives statements to a reporter, he should

not complain when those statements are recorded for later use because the plaintiff knows that part of a reporter's duty is to relay the information given.").

¹¹⁸ See *White*, 971 F.2d at 1398.

deals with celebrity issues all the time and its judges must know what they are doing.

The appeals court decisions in the area of intrusion may be somewhat less damaging to the common law of tort. First, no one is likely to think that its judges have special expertise in this area. Second, the opinion in *Alpha Therapeutic* was withdrawn, albeit more than a year after it was filed.¹¹⁹

Nevertheless, no one can be sure at this point what "a reasonable expectation of privacy" means in the Ninth Circuit, at least regarding those interviewed by identified news gatherers covertly recording the interviews. Of course, this confusion and the likely chill on investigative reporting accompanying the confusion assumes that news gatherers and their lawyers are aware of both *Deteresa* and *Alpha Therapeutic*. But they will not find out about *Alpha Therapeutic* by sheppardizing *Deteresa* since that case was never distinguished or even cited in *Alpha Therapeutic*. And while *Alpha Therapeutic* can be discovered by sheppardizing *Sanders*, *Sanders* did not discuss or even cite *Deteresa*. Clearly, there is a disconnect regarding the three cases that may cause problems for counsel down the road.

B. Mitigation of the Damage

Many law review articles are published with an eye to solving a troubling substantive or procedural legal problem. But, when the problem is the inadequacy of judges to deal correctly and consistently with an important area of the law and the judges are lifetime appointees, there is not much that can be suggested to mitigate the damage being done other than to warn counsel of the danger, here of pursuing common law claims of inva-

sion of privacy in the United States Court of Appeals for the Ninth Circuit. Efforts should be made at the outset of litigation, if it is in the client's interest, to file such claims in state court and, if possible, to structure the case within ethical bounds so as to increase the likelihood that it will not be removed to federal district court.

Will the United States Supreme Court step in to mitigate the damage? Don't count on it. In modern times, the Court has not shown much interest in dealing with the common law tort of privacy, even when they implicate important First Amendment interests. There have been a few exceptions,¹²⁰ and even one right of publicity case has been heard,¹²¹ but the grants of certiorari have been few and far between.

It may be that persistent analytical criticism of the court's handling of invasion of privacy cases in scholarly law journals may make a difference. However, the hullabaloo over the decision in *White v. Samsung Electronics America, Inc.* does not appear to have had much effect. Perhaps all we can do is hope for future appointments to the court of lawyers or law professors better versed in tort law.

V. CONCLUSION

In a perfect world the Ninth Circuit would not be allowed to decide common law invasion of privacy cases. But until such time as we achieve world perfection, that court should decide these cases en banc, thus reducing the danger of erroneous or conflicting decisions by three-judge panels. Moreover, counsel should think twice about pressing such cases in this court.

¹¹⁹ 237 F.3d 1007 (9th Cir. 2001). The author made an e-mail inquiry to Douglas E. Murell, Esquire, one of the counsel for NHK, as to the reason for the Ninth Circuit's order of January 12, 2001 withdrawing the opinion. His e-mail response of January 7, 2002 said, "The Ninth Circuit withdrew its opinion at the request of all counsel as part of a global resolution of the entire matter." This strongly suggests that the court did not withdraw its opinion because it thought the ruling on the claim of intrusion to be wrong or inconsistent with its earlier decision in *Deteresa*.

¹²⁰ See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (unreasonable publication of private facts); *Time, Inc. v. Hill*,

385 U.S. 374 (1967) (false light); *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974) (false light).

¹²¹ *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). In *Zacchini*, a local television station's reporter, over Zacchini's objection, filmed and broadcast his entire "human cannonball" act claiming it was a legitimate news story protected by the First Amendment. The Supreme Court held that the First Amendment and Fourteenth Amendments do not permit a news organization to invade a performer's right of publicity by exhibiting his entire act or performance, thereby taking some or all of the attached economic value in the guise of reporting the news.